JOHN D. GIFFIN, CASB NO. 89608
john.giffin@kyl.com
JOSEPH A. WALSH, II, CASB No. 143694
joe.walsh@kyl.com
JOHN COX, CASB NO. 197687
john.cox@kyl.com
DAVID TONG, CASB NO. 238971
david.tong@kyl.com
KEESAL, YOUNG & LOGAN
A Professional Corporation
Four Embarcadero Center
Suite 1500
San Francisco, California 94111
Telephone: (415) 398-6000
Facsimile: (415) 981-0136

Attorneys for Defendants
REGAL STONE, LTD. and FLEET MANAGEMENT, LTD.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, vs. M/V COSCO BUSAN, LR/IMO Ship. No. 9231743 her engines, apparel, electronics, tackle, boats, appurtenances, etc., *in rem*, THE SHIPOWNERS' INSURANCE & GUARANTY COMPANY LTD., REGAL STONE, LIMITED, FLEET MANAGEMENT LTD., and JOHN COTA, *in personam*, Defendants.	Case No. C 07 06045 (SC) **DEFENDANTS REGAL STONE LTD. AND FLEET MANAGEMENT, LTD.'S NOTICE OF MOTION AND MOTION TO DISMISS, OR IN THE ALTERNATIVE, STAY PROCEEDINGS [FRCP 12(b)(1)]** **Date:** May 9, 2008 **Time:** 10:00 a.m. **Dept.:** 1 **(The Honorable Samuel Conti)**

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TO ALL PARTIES TO THIS ACTION AND THEIR ATTORNEY(S) OF RECORD:

NOTICE IS HEREBY GIVEN that on May 9, 2008 at 10:00 a.m. in Courtroom 1 of the above-entitled Court, the Honorable Samuel Conti presiding, Defendants REGAL STONE, LTD. and FLEET MANAGEMENT, LTD. ("Defendants") will move to dismiss, or in the alternative to stay, proceedings pursuant to the Federal Rules of Civil Procedure, Rule 12(b) 1, on all causes of action against Defendants contained in Plaintiff UNITED STATES OF AMERICA's ("Plaintiff") Complaint on file herein.

This Motion will be based upon this Notice of Motion and Motion to Dismiss and Stay Proceedings, the accompanying Memorandum of Points and Authorities, the Declarations of Cynthia Hudson, K. Tim Perkins and Joseph A. Walsh II and all Exhibits attached thereto, the complete files and records of this action, and such other oral and documentary evidence as may be introduced at the hearing of this matter.

I. INTRODUCTION

Defendants REGAL STONE, LTD. and FLEET MANAGEMENT, LTD. ("Defendants") move to dismiss the United States' claims for removal costs and damages, on the grounds that the Court lacks subject matter jurisdiction. The Court lacks subject matter jurisdiction because the United States has ignored the Oil Pollution Act's ("OPA") mandatory claims presentation requirement. OPA requires the United States to submit detailed invoices for its removal costs and damages, and to allow Defendants 90 days to pay those invoices, before filing suit. Until the United States complies with these provisions, the Court lacks jurisdiction to hear its claims for removal costs and damages.

Counts One and Five of the complaint seek recovery of the United States' removal costs and damages under the National Marine Sanctuaries Act ("NMSA") and the Park System Resource and Protection Act ("PSRPA"). However, the damages recoverable under those statutes are identical to those recoverable under OPA. Trustee agencies of the United States and the State of California have begun a multi-year, natural resource damage assessment ("NRDA") process that includes an assessment of injuries to resources within marine sanctuaries and parks resulting from the Cosco Busan incident. They will be seeking compensation for any such injuries under OPA, once the NRDA process is complete. Because the United States is seeking recovery for damages to marine sanctuaries

and national parks under the PSRPA, the NMSA, and OPA, OPA's claims presentation requirement applies to these claims.

Count Six seeks civil penalties under the Clean Water Act. However, the government has failed to properly plead this claim. Moreover, the claim is not ripe for adjudication at this time. Even if the claim were properly pled and justiciable, which it is not, it should be stayed pending completion of the ongoing natural resource damage assessment between the Responsible Party and the various trustees including the United States.

Defendants also move to dismiss the United States' claim seeking a declaration that Defendants are liable for all removal costs and damages, because Defendants have already acknowledged they are strictly liable to pay for removal costs and damages resulting from the COSCO BUSAN incident. Given this situation, there is no case or controversy for the court to address.

The United States has advised that it will ask the Court to rule on whether Defendants are entitled to partial reimbursement of some of their OPA liabilities from the Oil Spill Liability Trust Fund (OSLTF). OPA allows a ship owner to seek such reimbursement from the OSLTF in some cases. If the Court ruled in Defendants favor on this issue, it would obligate the OSLTF to pay Defendants tens of millions of dollars. However, the issue is not within the Court's subject matter jurisdiction. OPA does not waive the sovereign immunity of the United States, or confer jurisdiction on this Court to rule on whether Defendants are eligible for partial reimbursement from the OSLTF. Instead, OPA provides that such claims for reimbursement should be submitted to the National Pollution Funds Center ("NPFC"), a division of the Coast Guard that administers the OSLTF. The doctrines of sovereign immunity, exhaustion of administrative remedies, and primary jurisdiction all require the court to dismiss any claims relating to this issue.

II. APPLICABLE LAW GOVERNING MOTIONS TO DISMISS FOR LACK OF JURISDICTION.

On a motion to dismiss for lack of jurisdiction, the plaintiff bears the burden of establishing that jurisdiction exists. Rio Properties, Inc. v. Rio Int'l Interlink, 284 F.3d 1007, 1019 (9th Cir. 2002). Unless a plaintiff can prove otherwise, a federal court must presume an action lies outside of its

jurisdiction. See, Kokkonen v. Guardian Life Ins. Co., 511 U.S. 375, 377 (1994); see also, Stock West, Inc. v. Confederated Tribes of the Colville Reservation, 873 F.2d 1221, 1225 (9th Cir. 1989). "A plaintiff suing in federal court must show in his pleading, affirmatively and distinctly, the existence of whatever is essential to federal jurisdiction, and, if he does not do so, the court, on having the defect called to its attention or on discovering the same, must dismiss the case, unless the defect be corrected by amendment." Smith v. McCullough, 270 U.S. 456, 459 (1926); Tosco Corp. v. Communities for a Better Env't, 236 F.3d 495, 499 (9th Cir. 2001).

A party moving to dismiss for lack of subject matter jurisdiction may submit "affidavits or any other evidence properly before the court. * * * It then becomes necessary for the party opposing the motion to present affidavits or any other evidence necessary to satisfy its burden of establishing that the court, in fact, possesses subject matter jurisdiction." Assoc. of Am. Med. Colleges v. United States, 217 F. 3d 770, 778 (9th Cir. 2000); Safe Air for Everyone v. Meyer, 373 F. 3d 1035, 1038 (9th Cir. 2004).

III. RELEVANT FACTS

On November 7, 2007, the COSCO BUSAN discharged approximately 53,000 gallons of bunker fuel into San Francisco Bay. (Declaration of K. Tim Perkins ("Perkins Decl.").) Defendants immediately took responsibility for the oil spill cleanup and accepted liability for settling claims for damages resulting from the oil spill. (Id.) They have paid in excess of $40 million to date in clean up costs, and have cooperated and participated within the Unified Command System to respond to the spill. (Id.) They continue to pay the costs for the clean up of the oil and are now participating in a cooperative assessment of damage to natural resources resulting from the spill. (Perkins Decl.; Declaration of Cynthia Hudson ("Hudson Decl."); Declaration of Gary Mauseth ("Mauseth Decl.").)

On November 8, 2007, the California Department of Fish and Game Office of Spill Prevention and Response designated Regal Stone Limited as the Responsible Party pursuant to California Government Code section 8670.51.1(a)(1). (Perkins Decl., Exhibit A.) On November 9, 2007, the United States Coast Guard issued a similar designation and notice pursuant to the OPA. (Id.) Both notices required the Responsible Party to widely advertise the manner in which claims arising from the incident would be accepted and paid. (Id.)

Defendants have not contested these notices of designation. (Perkins Decl., ¶ 5.) On November 10, 2007, Hudson Marine Management Services ("HMMS") set up a claims center and widely advertised the claims handling process with advertisements in local media, the internet, and by posting fliers at relevant marinas and other locations. (Hudson Decl., ¶ 4.) Thereafter, HMMS began processing and paying claims. (Id.) The normal practice following a spill is for the United States to issue invoices to the Responsible Party for its response costs. (Perkins Decl., ¶ 7; Hudson Decl., ¶ 6.) The responsible party then reimburses the United States for its costs. (Id.) To date, only five claims have been received from the United States. (Hudson Decl., ¶ 6.) Three have been settled and two are pending. (Id.) The pending claims are less than 90 days old. (Id.)

On November 30, the United States filed this action. It filed the action because it claimed it needed security for its claims against the COSCO BUSAN. However, it is not necessary to institute a lawsuit to obtain such security, and it is standard practice for insurers of vessels such as the COSCO BUSAN to issue security when it is requested, without first requiring that a lawsuit be filed. (Federal Rules of Civil Procedure, Supplemental Rule E; Declaration of Joseph A. Walsh ("Walsh Decl.") ¶ 2.) The insurer for the Defendants in this case provided the United States security for its claims in the amount of $79,500,000.00. (Walsh Decl., Exhibit A.)

Agencies of the United States and the State of California, with jurisdiction over the natural resources impacted by the COSCO BUSAN oil spill ("Trustee Agencies"), have commenced a cooperative natural resource damages assessment ("NRDA") process, pursuant to the OPA NRDA regulations, set forth at 15 C.F.R. § 990, and State law. (Walsh Decl., ¶ 5.) The NRDA regulations require the Trustee Agencies to follow a detailed assessment process, and to seek public comment and input, before settling any claims for natural resource damages. (Id.) If the Trustee Agencies follow the NRDA regulations, they are entitled to a rebuttable presumption under OPA that their determinations of damages to natural resources are correct. 33 U.S.C. § 2706(e)(2). The NRDA process normally takes several years to complete. (Mauseth Decl., ¶ 6.) Among the injuries that the trustees are assessing are injuries to resources under the jurisdiction of national parks and national marine sanctuaries. (Id.; Walsh Decl.)

IV. OIL POLLUTION ACT OF 1990

In 1990 following the EXXON VALDEZ oil spill, Congress overhauled the nation's oil pollution laws by enacting OPA. Prior to the enactment of OPA, a vessel owner's liability to the United States for oil pollution was governed by the Federal Water Pollution Control Act ("FWPCA"), 33 U.S.C. 1321. In hearings leading to the enactment of OPA, Congress expressed dissatisfaction with the FWPCA. Its criticisms included the fact that the FWPCA only addressed a vessel owner's liability to the United States, and that it limited that liability to $150 per gross ton of the vessel discharging the oil. This limit was viewed as too low. See Oil Spill Liability and Compensation: Hearing Before the Subcomm. On Water Resources of the Comm. On Public Works and Transp., H. of Rep., 101st Cong. 78 (1989) ("[L]liability under the FWPCA is low ($150/ton) and the scope of damages to which liability pertains is limited to the Federal Government's cleanup costs and natural resource damages.").

Complicating matters, a vessel owner could not assert a credit against the $150/ton limitation amount for funds it expended in cleaning up the spill. United States v. Dixie Carriers, 736 F.2d 180, 183 (5th Cir. 1980); Steuart Trans. Co. v. Allied Towing Corp., 596 F.2d 609, 619 (4th Cir. 1979). Courts also held that the FWPCA pre-empted other causes of action by the United States against a vessel owner to recover removal costs incurred to clean up an oil spill. Matter of Oswego Barge Corp., 664 F.2d 327, 344 (2d Cir. 1981); United States v. M/V BIG SAM, 681 F.2d 432 (5th Cir.1982). Thus, the United States could only recover its response costs from a discharging vessel up to the FWPCA limits on its liability, and the owner was not entitled to a credit against its FWPCA liability for any costs it expended to clean up a spill. The FWPCA thus created a financial disincentive for vessel owners to spend money to clean up oil spills. See Dixie Carriers, 736 F.2d at183-185.

Congress was also dissatisfied with the settlement of private party claims following oil spills. It heard testimony that individuals were often forced to litigate their claims in court for years in order to recover their losses. Congress insisted that those injured by spills should be swiftly compensated for their losses: "We do not want claimants to have to wait years upon years to recover their losses while lawsuits drag on in the courts. Instead, if they are unable to reach a settlement with the spiller within

90 days, they can be compensated from the oil industry financed by the fund, and the fund will go after the spiller for reimbursement." 135 Cong. Rec. H7954-H7978 (daily ed. Nov. 2, 1989); "The thrust of this legislation is to eliminate, to the extent possible, the need for an injured person to seek recourse through the litigation process, which—as we all know—can take years." 135 Cong. Rec. H7954-H7978 (daily ed. Nov. 2, 1989).

In OPA, Congress remedied these deficiencies. It made clear that a vessel owner is strictly liable for all clean up costs and damages resulting from a discharge of oil from its vessel. 33 U.S.C. §2702. It required the President to designate the owner of a discharging vessel as the "Responsible Party" and required the Responsible Party to publish a notice advising claimants of this designation, and procedures by which they may submit claims for reimbursement. 33 U.S.C. § 2714. To avoid delays in the payment of claims, it made the Responsible Party liable to pay interest after 30 days from the date on which a claim is received, and to establish procedures for interim, partial payments to claimants. 33 U.S.C. §§ 2705, 2714(b)(2).

To discourage litigation over claims in court, Congress provided that a claimant must first present a claim for removal costs or damages to the Responsible Party, following the procedures identified in the notice published pursuant to 33 U.S.C. § 2714. See 33 U.S.C. § 2713(a) & (c). If, after 90 days, the Responsible Party does not settle with a claimant, the claimant may sue the Responsible Party, or may submit its claim to the National Pollution Funds Center (NPFC), established under OPA to administer the Oil Spill Liability Trust Fund ("Fund"). Id. OPA provides that the Fund may be used to settle such claims. 33 U.S.C. § 2712(a)(4). If the Fund does so, it becomes subrogated to the rights of the claimant, and may seek recovery of amounts paid from the Responsible Party. 33 U.S.C. §§ 2712(f), 2715.

As with most comprehensive statutes, OPA is the "result of innumerable compromises between competing interests, reflecting many competing purposes and goals." Boca Ciega Hotel Inc. v. Bouchard Trans. Co., Inc., 51 F.3d 235, 238 (11th Cir. 1995). Thus, while OPA substantially increased the liability of vessel owners, it also preserved the right of a vessel owner to limit its liability in some cases. 33 U.S.C. § 2704. To eliminate the financial disincentive for a vessel owner to respond to an oil spill that had existed under the FWPCA, Congress provided that the right to limit

liability, or to assert a complete defense to liability, is lost if the Responsible Party fails to provide all reasonable cooperation and assistance requested by a responsible official, or to comply with a Coast Guard cleanup order. 33 U.S.C. §§ 2703(c) & 2704(c). Even a party that is entitled to a complete defense under OPA remains responsible for responding to a spill and cleaning it up. Unocal Corp. v. U.S., 222 F.3d 528, 534-36 (9th Cir. 2000).

Thus, even though a Responsible Party may have a complete defense to liability, or the right to limit its liability, OPA provides that the Responsible Party must respond to the spill and clean it up, if the federal or state governments request it to do so – even if the cost of doing so exceeds the limits on the Responsible Party's liability under OPA. Because it is rarely clear in the days after a spill whether the Responsible Party has a defense to OPA liability, or the right to limit that liability, the Coast Guard, as a matter of practice, always designates the vessel owner and/or operator from which a discharge occurs as the Responsible Party, and directs the Responsible Party to respond and clean up the spill. If a Responsible Party believes it is entitled to a complete defense to liability, or that it has the right to limit its liability under OPA, OPA allows the Responsible Party to submit a claim to the NPFC for reimbursement of amounts it has paid that exceed its liability. 33 U.S.C. §§ 2708, 2713(b)(1)(B).

These provisions create a powerful incentive for vessel owners and their insurers to respond to spills and to clean them up to the satisfaction of state and federal officials. Unlike the FWPCA, under OPA a vessel owner who refuses a request that it clean up oil spilled from its vessel runs the risk that the NPFC will deny its claim for reimbursement on the grounds that it failed to provide cooperation and assistance requested by the Coast Guard or the State.

While OPA allows a vessel owner to seek reimbursement of removal costs and damages it pays in excess of the limits on its liability from the Fund by presenting an administrative claim to the NPFC, it does not allow the vessel owner to sue the United States for reimbursement of those costs in court. 33 U.S.C. section 2708 is the only provision of OPA that permits a Responsible Party to obtain reimbursement of such costs, and it only allows the Responsible Party to do so by filing an administrative claim with the NPFC under 33 U.S.C. § 2713.

The NPFC is an administrative agency within the United States Coast Guard. See http://www.USCG.mil/npfc. Located in Arlington Virginia, the NPFC maintains a claims division which processes claims brought pursuant to 33 U.S.C. § 2713 by federal and state agencies, private individuals, and responsible parties. NPFC regulations governing OPA claims are published at 33 C.F.R. part 136. The NPFC also publishes claims guidelines for claimants, including a "Responsible Party Claim Submission Guidance" for ship owners seeking reimbursement from the OSLTF. See http://www.USCG.mil/npfc/docs/PDFs/urg/URG_7_05.pdf. A claimant may seek reconsideration from a denial of a claim by the NPFC. 33 C.F.R. § 136.115(d). If the agency denies such a request, the denial will be deemed a final agency action, of which a claimant may seek review under the Administrative Procedures Act ("APA"), 5 U.S.C. §§ 701, *et seq.* .

V. THE UNITED STATES CLAIMS FOR REMOVAL COSTS AND DAMAGES MUST BE DISMISSED UNTIL THE UNITED STATES COMPLIES WITH OPA'S CLAIMS PRESENTATION REQUIREMENTS.

A. The Presentation Requirement of the Oil Pollution Act of 1990 Requires Dismissal of All Claims For Removal Costs or Damages

OPA requires that "all claims for removal costs or damages shall be presented ***first*** to the Responsible Party." 33 U.S.C. § 2713(a)(emphasis added). A claim must be specific. It must "inform the responsible party with some precision of the nature and extent of the damages alleged and the amount of monetary damages claimed. Otherwise, the responsible party will be unable to make an informed offer of its own, unable to engage in meaningful settlement negotiations, and thus unable to settle the matter by agreeing to a final amount." Johnson v. Colonial Pipeline Co., 830 F. Supp. 309, 311 (E.D. Va 1993). The NPFC regulations set forth the specificity requirements for a claim for response costs and damages. Id. A party may not sue the responsible party in court, unless the responsible party denies the claim or fails to respond within 90 days. 33 U.S.C. § 2713(c). As explained in Johnson, Congress hoped that this claims process would avoid the need for litigation:

> The purpose of the claim presentation procedure is to promote settlement and avoid litigation. Congress believed that lawsuits against parties are appropriate only 'where attempts to reach a settlement with the Responsible Party . . . were unsuccessful.' H.R. Rep. No. 242, 101st Cong., 1st Sess., pt. 2, at 66 (1989). The hope was to avoid costly and cumbersome litigation.

Johnson, 830 F.Supp at 311; see also, Boca Ciega, 51 F.3d at 238-234 ("OPA reflects Congress' desire to encourage settlement and avoid litigation.") The presentation requirement is jurisdictional and mandates dismissal when it is not complied with. Boca Ciega, 51 F.3d 235, 238-240 (11th Cir. 1995); Johnson v. Colonial Pipeline Co., 830 F.Supp. at 309-10; Marathon Pipeline Co. v. LaRoche Industries, 944 F.Supp 476, 477 (E.D. La 1996).

In this case, the United States has presented five small claims to Defendants. (Hudson Decl., ¶ 6.) Three have been settled and two are pending. (Id.) None are older than 90 days. (Id.) The United States filed this action 23 days after the Cosco Busan incident in blatant disregard of OPA's mandatory claims presentation requirements. Thus its claims for removal costs and damages resulting from the COSCO BUSAN incident must be dismissed.

B. The Presentation Requirement Applies to Claims for Removal Costs and Damages Under the NMSA and the PSRPA

OPA expressly requires that "all claims for removal costs and damages shall first be presented to the responsible party." 33 U.S.C. § 2713(a) (emphasis added). A claimant may only sue the responsible party if the responsible party denies the claim or fails to respond to it within 90 days. 33 U.S.C. § 2713(c).

OPA defines a "claim" as "a request, made in writing for a sum certain, for compensation for damages or removal costs resulting from an incident." 33 U.S.C. § 2701(3). "Incident" means "any occurrence . . . resulting in the discharge …of oil." 33 U.S.C. § 2701(14). The United States has determined that the COSCO BUSAN spill was an incident under OPA, as reflected in its Notice of Designation. (Perkins Decl., Exhibit "A.") Thus OPA's claims presentation requirement clearly applies to "all claims" for "removal costs" and "damages" that result from the COSCO BUSAN incident.

"Removal costs" are broadly defined in OPA to include the cost of:

> containment and removal of oil …from water and shorelines, or the taking of other actions as may be necessary to minimize or mitigate damage to public health or welfare, including, but not limited to, fish, shellfish, wildlife, and public and private property, shorelines, and beaches.

33 U.S.C. § 2701(30) & (31). OPA makes Defendants strictly liable for "all" of the United States removal costs resulting from the Cosco Busan incident. 33 U.S.C. § 2702(a) & (b)(1). "Damages" under OPA include damages for injury to, destruction of, loss of, or loss of use of, natural resources, including the reasonable costs of assessing the damage, and damages for injury to real or personal property, economic losses resulting from destruction of, real or personal property, lost revenues such as taxes, and increased costs of providing public services during or after removal activities. 33 U.S.C. § 2702(b)(2).

With these terms defined, there are no conceivable claims for removal costs or damages resulting from the Cosco Busan incident that the United States can recover under the NMSA or the PSRPA, that are not also recoverable under OPA. The PSRPA defines "damages" to include the cost of replacing or restoring damaged resources, the loss of use of those resources, and the costs of assessing such damages. 16 U.S.C. § 19jj(b). It defines Response Costs to include the costs of actions taken by the United States to prevent, minimize, or abate the destruction or loss of a park resource. 16 U.S.C. § 19jj(c). The NMSA also allows the United States to recover civil damages for the destruction of, or loss of use of, marine sanctuary resources. 16 U.S.C. § 1443. These definitions do not allow the United States to recover, under the NMSA or the PSRPA, any response costs or damages, as a result of the oiling of park or marine sanctuary resources, which are not otherwise recoverable under OPA.

Since all of the claims asserted by the United States are for damages or response costs resulting from the Cosco Busan incident, they are subject to OPA's claims presentation requirement. As set out above, Congress intended that OPA would minimize litigation following an oil spill by creating a mandatory non-judicial claims presentation requirement. Congress' use of the words "all claims" in 33 U.S.C. § 2713 (a) and its broad definitions of "claim", "removal costs," and "damages" reflect its clear intent to require that claims such as those pursued by the United States in this lawsuit be presented to the responsible party for settlement before a lawsuit is filed. Nothing in OPA suggests that Congress intended to permit claimants, including the government, to avoid the mandatory claims process by suing for OPA removal costs or damages under non-OPA causes of action.

OPA's savings provision does not affect or modify the claims presentation requirement. The provision simply states that OPA should not be construed to affect the authority of the United States or a State to impose *additional* liability or *additional* requirements relating to a discharge of oil. 33 U.S.C. § 2718(c). This provision preserves the rights of States and Congress to enact laws in addition to OPA that impose additional liabilities on polluters. After complying with OPA's claims presentation requirements, nothing prevents the United States from suing Defendants under non-OPA causes of action. Thus, OPA's savings provision does not allow a claimant to disregard the mandatory claims presentation requirement under OPA for removal costs or damages that result from an incident. Boca Ciega, 51 F.3d at 239.

C. In the Alternative, the Court Should Stay the Case with Respect to the Non-OPA Causes of Action

If the Court determines that OPA's presentation requirements do not apply to the non-OPA causes of action, then Defendants request that the Court stay any proceedings with respect to these claims. The Court has the inherent power to stay proceedings before it in the interest of judicial economy. Landis v. North Am. Co., 299 U.S. 248, 254 (1936) (Power to stay is "incidental to the power inherent in every court to control the disposition if the causes of action on its docket.") Staying proceedings is appropriate when the interests of justice require it, the adjudication of a claim would be a waste of judicial resources, and the plaintiff will not be substantially harmed by the stay. See Hess v. Gray, 85 F.R.D. 15, 27 (N.D. Ill 1979).

These principles favor granting a stay of the United States' causes of action brought against Defendants under the NMSA and the PSRPA. The damages being sought by the United States under the NMSA and the PSRPA are the same damages that the United States will seek to recover under OPA. Only a very small part of the United States response costs will be for response activities in marine sanctuaries or national parks. The damages for injury to natural resource within sanctuaries and parks are being pursued by the NRDA trustees, under the OPA NRDA regulations. Defendants have advanced the U.S. Dept. of the Interior $500,000 to date to conduct this assessment. (Walsh Decl., ¶¶ 5-6.)

Because OPA prohibits a double recovery for injuries to natural resources, 33 U.S.C. 2706(d)(3), the United States cannot pursue a claim for injury for these resources under both OPA and non-OPA causes of action. Conversely, permitting the United States to pursue its claims under the NMSA and the PSRPA will prejudice the Defendants. Such a result will force the Defendants to expend time and resources litigating their liability under three statutes when the pertinent issues can be resolved under a single statute- OPA '90. Finally, a stay will save judicial resources. There is no reason for the Court to judicially oversee claims that would otherwise resolve through the OPA claims adjudication process.

VI. THE UNITED STATES' FORFEITURE ACTION UNDER THE NMSA MUST BE DISMISSED BECAUSE THE COMPLAINT DOES NOT ALLEGE THE DEFENDANTS HAVE TAKEN OR RETAINED SANCTUARY RESOURCES.

Courts must strictly construe forfeiture statutes against the government. United States v. One 1992 Ford Mustang, 73 F. Supp. 2d 1131, 1131 (C.D. Cal. 1999)("Forfeiture is a harsh and oppressive procedure which is not favored by the courts."); see also United States v. $191,910.00 in U.S. Currency, 16 F. 3d 1051, 1069 (9th Cir. 1994) (overruled on other grounds). Therefore, this Court must strictly construe the NMSA's forfeiture section. In construing the NMSA's forfeiture section, the starting point is the statute's language. United States v. One Parcel of Land In The Name of Mikell, 33 F. 3d 11, 13 (5th Cir. 1994). If a statute's language makes Congress' intent clear, "that is the end of the matter." Id.

The NMSA provides:

> Any vessel (including the vessel's equipment, stores, and cargo) and other item used, *and any sanctuary resource taken or retained*, in any manner, in connection with or as a result of any violation of this chapter or of any regulation or permit issued under this chapter shall be subject to forfeiture to the United States pursuant to a civil proceeding under this subsection…

16 U.S.C. § 1437(d)(1)(emphasis added). The foregoing emphasized language demonstrates Congress' intent to permit vessel forfeiture under the NMSA only when a vessel is used to take or

retain a sanctuary resource.[1] This Court must strictly construe the statue to this effect. If Congress intended the NMSA to permit vessel forfeiture for a violation of the NMSA that did *not* involve the taking or retention of a sanctuary resource, it would have used "or" instead of the above-emphasized "and." However, Congress did not do so. This Court must presume that "Congress chose its words with as much care as [the Court] brings to bear on the task of statutory interpretation." United States v. BCCI Holdings (Luxembourg), S.A., 833 F. Supp. 17, 21 (D.D.C. 1993)(citation omitted). Consequently, the United States must allege sanctuary resources were taken or retained in connection with or as a result of the COSCO BUSAN incident. The United States fails to allege this essential element. Therefore, the Defendants respectfully request that this Court dismiss the United States' NMSA forfeiture action.

Additional provisions of the NMSA's forfeiture section demonstrate that Congress contemplated vessel forfeiture only upon the taking or retention of a sanctuary resource. Critically, the NMSA provides that for vessel forfeiture purposes, "there is a rebuttable presumption that *all sanctuary resources found on board* a vessel that is used…in connection with a violation of this chapter…were taken or retained in violation of this chapter…" 16 U.S.C. § 1437(d)(4)(emphasis added); see also 16 U.S.C. § 1437(d)(3)(disposal of sanctuary resources seized in connection with a vessel forfeiture). Taken together with 16 U.S.C. § 1437(d)(1), these additional provisions establish an enforcement regime for addressing instances where sanctuary resources are taken or retained from designated marine sanctuaries. The United States complaint does not implicate this regime because it does not allege such conduct resulted from the COSCO BUSAN incident or that the COSCO BUSAN was used to perpetrate such conduct. Therefore, this Court should dismiss the Unites States' forfeiture action.

Finally, although the NMSA does not define what conduct results in the taking or retention of a sanctuary resource, the NMSA's language demonstrates that Congress intended such conduct to be something more than conduct resulting only in the destruction, loss, or injury to sanctuary resources.

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[1] "Sanctuary resource" means any living or nonliving resource of a national marine sanctuary that contributes to the conservation, recreational, ecological, historical, research, educational, or aesthetic value of the sanctuary." 16 U.S.C. § 1432(8).

While such conduct alone supports other forms of relief, e.g., civil penalties (see 16 U.S.C. §§ 1437(c)(1) & 1436(1)), *in rem* liability (16 U.S.C. § 1443(2)) and injunctive relief (16 U.S.C. § 1437(i), the NMSA's forfeiture section requires such conduct to occur *in connection* with or *result* in a sanctuary resource being taken or retained. See 16 U.S.C. §§ 1437(d)(1) & 1436(1). In other words, Congress intended conduct causing damage to, the loss of, or injury to a sanctuary resource to permit vessel forfeiture only if such conduct occurred in connection with or resulted in a *separate and distinct* event constituting the taking or retention of a sanctuary resource. Accordingly, the United States' allegation that "vessels used to destroy and/or cause the loss and/or injure National Marine Sanctuaries…are subject to forfeiture…" is insufficient to support its forfeiture action. See Complaint ¶ 34. The Defendants respectfully request that this Court dismiss the United States' NMSA forfeiture action.

VII. THERE IS NO ACTUAL CONTROVERSY UNDER THE DECLARATORY JUDGMENT ACT

Plaintiff's fourth cause of action requests a declaratory judgment that Defendants are liable for removal costs and damages resulting from the oil spill. However, since Defendants admit they are strictly liable to pay OPA response costs and damages, there is no case or controversy for the Court to address. Once again, Defendants reiterate that they accepted the notice of designation months ago as the Responsible Party and have been funding the response and paying legitimate claims for damages resulting from the oil spill.

The Declaratory Judgment Act authorizes federal courts to declare the rights and other legal relations of parties when an actual controversy exists. 28 U.S.C. § 2201. The Act provides that "in a case of actual controversy within its jurisdiction . . . any court of the United States . . . may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought." 28 U.S.C. § 2201(a). The "actual controversy" required by the Declaratory Judgment Act is the same as the "case or controversy" requirement of Article III. Societe de Conditionnement en Aluminum v. Hunter Eng'g Co., 655 F.2d 938, 942 (9th Cir. 1981) (citing Aetna Life Ins. Co. v. Haworth, 300 U.S. 227, 239-240 (1937)). "Issuing a judgment in a case without an actual controversy is an advisory opinion, which is prohibited by Article III of the United States

Constitution." Duhn Oil Tool, Inc. v. Cooper Cameron Corp., 2007 WL 3335008, at *3 (E.D. Cal. Nov. 9, 2007). "[T]he facts alleged, under all the circumstances, [must] show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941). "If a case is not ripe for review, then there is no case or controversy." Principal Life Ins., Co. v. Robinson, 394 F.3d 665, 669 (9th Cir. 2005). In this case, there is no actual case or controversy between the parties. Consequently, the Court cannot enter a declaratory judgment.

OPA provides that in an action to recover removal costs under OPA, "the Court shall enter a declaratory judgment on liability for removal costs or damages that will be binding on any subsequent action or actions to recover further removal costs or damages." 33 U.S.C. § 2717(f)(2). However, this provision is predicated upon an action being filed to recover OPA removal costs, which cannot occur until the claims presentation requirements of 33 U.S.C. § 2713 have been followed. As set out above, the United States has not complied with these requirements. Therefore, it cannot seek a declaratory judgment under 33 U.S.C. § 2712(f)(2).

VIII. PLAINTIFF'S CLAIM FOR CIVIL PENALTIES IS INSUFFICIENTLY PLED AND IS NOT RIPE FOR ADJUDICATION

The Government's action now also alleges as its Sixth Cause of Action, an entitlement to judicially assessed civil penalties under the Clean Water Act ("CWA"), 33 U.S.C. 1321 (b)(7).[2] This new cause must be dismissed for two reasons. First, the U.S. fails to properly plead a claim for which relief under the CWA is allowed. Second, a claim for civil penalties under the CWA has not yet accrued and thus is not yet ripe for adjudication.

A. The Government Failed To Properly Plead A Claim For Civil Penalties Under The CWA

The U.S. fails to properly plead a claim for civil penalties under the CWA. While Federal Rule of Civil Procedure 8 permits liberal notice pleading, it does not sanction pleadings that are void

[2] Within days of Defendants filing their original motion to dismiss, the U.S. filed a First Amended Complaint ("FAC") in an effort to plead around the Motion and salvage this lawsuit.

of a short and plain statement of operative facts and the elements of a prima facie case. Bautista v. Los Angeles County, 216 F. 3d 837, 840 (9th Cir. 2000). "[Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only "fair notice" of the nature of the claim, but also "grounds" on which the claim rests. See 5 Wright & Miller § 1202, at 94, 95 (Rule 8(a) "contemplate[s] the statement of circumstances, occurrences, and events in support of the claim presented" and does not authorize a pleader's "bare averment that he wants relief and is entitled to it"). Bell Atlantic Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007).

The Sixth Cause of Action lacks reasonable specificity and should be dismissed out right. "[S]tatutes imposing penalties are strictly construed and pleadings to recover statutory penalties are likewise strictly construed." Connolly v. United States, 149 F.2d 666, 669 (9th Cir. 1945). In Connolly, the United States sought, amongst other forms of relief, penalties for two individuals' herding cattle and horses on an Indian reservation without a grazing permit. Id. at 667. The United States' complaint made no reference to the specific penalty statute- 25 U.S.C. 179. Id. at 668. Nevertheless, the trial court concluded that based on a review of the complaint's factual allegations, the United States could recover penalties. Id. In setting aside the trial court's assessment of penalties, the Ninth Circuit noted that there was no reference to the statutory penalty in the complaint. Id. at 668.

The FAC is similarly flawed. It merely states that Defendants Regal Stone and Fleet are liable to the United States for a civil penalty pursuant to 33 U.S.C. 1321(b)(7). (FAC paragraphs 52-53). There are no further factual allegations in support of this claim. Critically, Section 1321(b)(7) lists at least five different theories that allow for a civil penalty: (1) failure to carry out a removal order of the President; (2) failure to comply with an administrative order effecting public health; (3) failure to comply with a regulation under the National Contingency Plan; (4) causing an oil spill by gross negligence; and (5) strict liability. FRCP 1321(b)(7). The U.S. has provided no notice to Regal Stone or Fleet as to which of these theories it advances, let alone requisite factual allegations for each.[3]

[3] The United States does not, because in good faith it cannot, allege the factual basis to support the imposition of penalties. The referring agency, in this case presumably the United States Coast Guard, has not yet as of the date of filing the FAC completed its investigation into the cause of incident.

Moreover, the United States fails to give notice as to a "sum certain" or even an amount "up to" as civil penalties. Finally, the United States further fails to include factual allegations (and amounts) distinguishable as between the Defendants. Therefore, the CWA claim is insufficiently pled and must be dismissed.

B. The Government's Claim For Civil Penalties Under The CWA Is Not Justiciable

The government's Sixth Cause of Action is not justiciable and should be dismissed. In past cases, the United States has argued to the District Court and the Court of Appeals that a cause of action for civil penalties arising out of an oil spill does not accrue under the CWA until after the oil removal is completed. United States v. Barge Shamrock, 635 F.2d 1108, 1110 (4th Cir. 1980). In the Barge Shamrock, the United States successfully argued that a cause of action for civil penalties under the CWA does not accrue until the completion of oil removal. In this case, the oil spill clean up response, third party claims handling and natural resource damage assessment is ongoing. (See Joint Case Management Conference Statement, 20:14-17; Mauseth Decl; Perkins Decl.) Accordingly, until completion of the oil spill clean up, no cause of action for civil penalties exists under the CWA.[4] This cause of action is simply not ripe for judicial determination.

C. In The Alternative The Government's CWA Cause Of Action Must Be Stayed

Even if the U.S. has properly pled the CWA claim, and if the claim was currently justiciable, this claim must be stayed pending the completion of the NRD. In order to determine the amount of any civil penalty under section 1321(b)(7) the court must consider a multitude of factors including the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge. FRCP 1321(b)(8). As stated above, the Responsible Party is currently engaged in both clean up efforts and a cooperative natural resource damage assessment. The success of the clean

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This fact calls into question whether the United States even has a good faith basis for seeking penalties in the first instance.

[4] The amount of a civil fine is to be determined after a consideration of certain specific factors including "the nature, extent, and degree of success of any efforts of the violator to minimize or mitigate the effects of the discharge." 33 U.S.C. 1321 (b)(8). These factors cannot be reasonably considered unless and until the clean-up operations are finalized.

up is yet to be determined as it is still ongoing. In addition, the efforts to minimize or mitigate the impacts of the discharge will not be known until the completion of the NRD when the court can consider the full range of environmental impacts and remediation. Therefore, if the court determines that the CWA claim is proper this case should be stayed pending the completion of the NRD.

IX. THIS COURT LACKS JURISDICTION TO DECIDE WHETHER THE DEFENDANTS ARE ENTITLED TO LIMIT THEIR OPA LIABILITY

Although not expressly set out in its Complaint, the Department of Justice has advised that it wants to litigate Defendants' entitlement to limit their OPA liability under 33 U.S.C. § 2704. If the Court has subject matter jurisdiction over this issue, then a decree by the Court that the Defendants are entitled to limit their OPA liability would bind the United States, and require the NPFC to reimburse Defendants any funds expended in response to the Cosco Busan incident above the limitation amount. This could result in a liability against the Oil Spill Liability Trust Fund in the amount of tens of millions of dollars.

This Court has no jurisdiction over the limitation issue. The United States has not waived its sovereign immunity with respect to such claims. Moreover, the doctrine of exhaustion of administrative remedies requires that the limitation issue first be presented for determination by the NPFC. If a shipowner is aggrieved by a decision of the NPFC, it may seek review of that decision under the Administrative Procedures Act. 5 U.S.C. §§ 701, *et seq*. Finally, the doctrine of primary jurisdiction weighs in favor of the Court deferring to the expertise of the NPFC with respect to the limitation issue.

A. The United States Has Not Waived Sovereign Immunity Under OPA '90

The United States may not be sued unless federal legislation specifically authorizes the suit. Hercules, Inc. v. United States, 516 U.S. 417, 422 (1996); Blackburn v. United States, 100 F.3d 1426, 1429 (9th Cir. 1996). Only Congress can consent to suits against the United States, the Executive is powerless to waive the federal government's sovereign immunity. E. CHEMERINSKY, FEDERAL JURISDICTION, §9.2.1 (3d ed.1999). "A waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed.'" United States v. Mitchell, 445 U.S. 535, 537–38 (1980) (citations omitted). "Any waiver of sovereign immunity is to be construed narrowly, with ambiguities resolved

in favor of the government. The natural consequence of the sovereign immunity principle is that the absence of consent by the United States is a fundamental defect that deprives the district court of subject matter jurisdiction." 14 CHARLES ALAN WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 3654 (3d ed. 1998) (citing cases).

OPA '90 does not include a waiver of the United States' sovereign immunity. See Int'l Marine Carriers v. Oil Spill Liability Trust Fund, 903 F. Supp. 1097, at 1102 (S.D. Tex. 1994) (finding even if Responsible Party could assert jurisdiction under 33 U.S.C. § 2717(b), sovereign immunity precluded the court's review of Responsible Party's claims for limitation of liability). "Nothing in OPA [33 U.S.C. §§ 2712, 2713, or 2715] can be construed as a waiver of sovereign immunity . . . . These sections do not create, nor can this court imply, a right to sue the [OSLTF] directly." Id. at 1102.

Consistent with the Int'l Marine Carriers decision, the Department of Justice has maintained in other cases that a district court lacks jurisdiction to decide whether a shipowner is entitled to limit its liability under OPA. For example, in Unocal v. United States, a buried Unocal crude oil pipeline was breached during construction of a rail line, resulting in an oil discharge. After paying to clean up the costs of the pipeline, Unocal sought reimbursement of its costs from the NPFC. When the NPFC denied the claim, Unocal sued the United States in the United States District Court for the District of Central California. The United States moved to dismiss Unocal's claims, on the grounds that the Court lacked subject matter jurisdiction to order the NPFC to reimburse Unocal. The Court ruled for the United States. Copies of the United States motion papers and the Court's order in the Unocal case are attached as Exhibits C-D to the Walsh Declaration filed concurrently with the Motion.

OPA does not say that a responsible party can sue in federal court to obtain a decree establishing its right to seek reimbursement from the OSLTF. Instead, it says that if a responsible party pays more than its OPA limitation amount, it can present a claim for reimbursement to the NPFC. 33 U.S.C. §§ 2708 & 2713(b). If the NPFC denies the claim, the responsible party can seek review under the APA. See International Marine Carriers, 903 F.Supp. at 1102; Gatlin Oil Co. v. United States, 169 F.3d 207 (4th Cir. 1999); Water Quality Insurance Syndicate v. United States, 522 F.Supp.2d 220 (D.D.C. 2007); Apex Oil Co. v. United States, 208 F.Supp.2d 642, 2002 A.M.C. 493

(E.D. La 2002); Smith Property Holdings, 4411 Connecticut L.L.C. v. United States, 311 F.Supp.2d 69 (D.D.C 2004).

The attempt by the United States to raise the limitation issue in this suit is inconsistent with the plain language of OPA, with the position taken by the United States in previous cases, and with the process followed by responsible parties and the NPFC in the cases cited in the preceding paragraph. Defendants are aware of no legal authority that suggests the Court has jurisdiction over the limitation issue. An order declaring that the Defendants are entitled to limit their liability would be tantamount to an order directing the NPFC to reimburse the Defendants for amounts expended above the limitation amount. Congress, in OPA, directed that such reimbursement claims be presented to the NPFC, which administers the OSLTF. Consequently, this Court lacks subject matter jurisdiction over the OPA limitation issues, and should dismiss the Complaint to the extent it raises the limitation issue.

B. Defendants Have Not Exhausted Their Administrative Remedies Before The NPFC

This Court should not address the limitation issue because the Defendants have not yet exhausted their administrative remedies. OPA '90 and the NPFC's regulations require Defendants to first present their claims for limitation of liability under OPA '90 to the NPFC.

The doctrine of exhaustion of administrative remedies provides "that no one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." Moncrief v. United States., 43 Fed. Cl. 276, 284 (1999) (granting defendant's motion to dismiss because plaintiff failed to exhaust administrative remedy)(citations omitted). "Exhaustion is required to serve the purposes of protecting administrative agency authority and promoting judicial efficiency." Id. (citations omitted). The Supreme Court of the United States has stated:

> [t]he agency, like a trial court, is created for the purpose of applying a statute in the first instance. Accordingly, it is normally desirable to let the agency develop the necessary factual background upon which decisions should be based. And since agency decisions are frequently of a discretionary nature or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise.

Moncrief, 43 Fed. Cl. at 284 (citing McKart v. United States, 395 U.S. 185, 193 (1969). "An agency's effectiveness may also be weakened if people are encouraged to ignore its procedures by the

allowance of 'frequent and deliberate flouting of the administrative process.'" Moncrief, 43 Fed. Cl. at 284 (citing McKart, 395 U.S. at 195). While failure to exhaust administrative remedies does not deprive a federal court of jurisdiction when an exhaustion statute is "merely a codification of the exhaustion requirement . . . ," federal courts should still require compliance with an exhaustion statute unless the suit alleges a constitutional claim. McBride Cotton and Cattle Corp. v. Veneman, 290 F.3d 973, 978-980 (9th Cir. 2002).

The only avenue available to a Responsible Party seeking reimbursement from the OSLTF for costs in excess of its liability limitation under OPA '90 is to present a claim to the NPFC. 33 U.S.C. § 2708. OPA conveys no right for either the Responsible Party or the United States to raise the limitation issue in federal court in the first instance. Instead, OPA '90 provides that a Responsible Party who is entitled to a limitation of liability under 33 U.S.C. § 2404, "may assert a claim for removal costs and damages under [33 U.S.C. § 2713]." See 33 U.S.C. §§ 2708(2) & 2713(b)(1)(B). At 33 C.F.R. §§ 136.1 through 136.313, the NPFC has promulgated regulations governing the "[p]resentation, filing, processing, settlement, *and adjudication* of claims authorized to be presented to the [OSLTF]." 33 C.F.R. § 136.1(a)(1) (emphasis added). The NPFC routinely determines claims by responsible parties for reimbursement of amounts expended in excess of their OPA limits on liability. See e.g. In re Kuroshima Shipping Act of God and Limitation of Liability Analysis, 2003 AMC 1681 (Nat'l Pollution Funds Center 2003). If a Responsible Party's claim for reimbursement is denied by the NPFC, the Responsible Party can seek judicial review of the NPFC's decision under the Administrative Procedure Act. See e.g., Water Quality Insurance Syndicate v. United States, 522 F.Supp.2d 220 (D.D.C. 2007).

Under this statutory and regulatory scheme, it is clear that Defendants must first present their claims for reimbursement to the NPFC, and exhaust their remedies with that agency, before seeking judicial review. The NPFC, as a branch of the United States Coast Guard, has the necessary expertise to adjudicate responsible parties' claims for reimbursement from the OSLTF for costs in excess of their liability limitation under OPA. With regard to such claims, there are several issues that the NPFC is better suited to resolve than a district court. For example, in order for a Responsible Party to establish a right to limit its

liability under OPA, the NPFC must determine whether the incident causing the discharge was the result of the violation of Coast Guard regulations, gross negligence, or willful misconduct. See 33 U.S.C. § 2704(c). It must also determine whether the actions taken by the Responsible Party were necessary to prevent, minimize, or mitigate the effects of an oil spill, that removal costs were incurred as a result of these actions, that the Responsible Party provided reasonable cooperation and assistance in a removal, and that the actions taken were consistent with the National Contingency Plan or directed by the Federal On-Scene Coordinator. See 33 C.F.R. § 136.203.

Consequently, the NPFC should be given the first opportunity to hear any and all of Defendants claims for reimbursement from the OSLTF for costs in excess of their liability limitation under OPA '90.

C. Alternatively, This Court Should Abstain From Addressing The Limitation Issue Under The Primary Jurisdiction Doctrine

Under the doctrine of primary jurisdiction, "courts may, under appropriate circumstances, determine that the initial decision making responsibility should be performed by the relevant agency rather than the courts." Syntek Semiconductor Co. Ltd. v. Microchip Tech, Inc., 307 F.3d 775, 780–81 (9th Cir. 2002). Although primary jurisdiction does not implicate the federal courts' subject matter jurisdiction, it "is properly invoked when a claim, even though cognizable in federal court, requires resolution of an issue of first impression or of a complicated issue committed to a regulatory agency by Congress." Id. at 780–81 (citations omitted). Primary jurisdiction "is committed to sound discretion of the court when 'protection of the integrity of a regulatory scheme dictates preliminary resort to the agency which administers the scheme.'" Id. at 781 (citations omitted). A court's invocation of the primary jurisdiction doctrine does not deprive it of jurisdiction- rather it imposes a stay on the litigation or dismisses the litigation without prejudice. See Id. at 782.

A court may properly invoke primary jurisdiction in suits initiated by the United States. In Far East Conference v. United States, the United States filed suit in a district court to enjoin what it alleged to be defendant's violations of the SHERMAN ANTITRUST ACT. 342 U.S. 570, 571 (1952). The defendant moved to dismiss the United States' suit on the ground that the "nature of the issues require

that resort must first be had to the Federal Maritime Board before a District Court could adjudicate the Government's complaint." Id. at 572. In concluding the Federal Maritime Board should hear the issues before the District Court, the Court observed:

> . . . [I]n cases raising issues of fact not within the conventional experience of judges or cases requiring the exercise of administrative discretion, agencies created by Congress for regulating the subject matter should not be passed over. . . . Uniformity and consistency in the regulation of business entrusted to a particular agency are secured, and the limited functions of review by the judiciary are more rationally exercised, by preliminary resort for ascertaining and interpreting the circumstances underlying legal issues to agencies that are better equipped than courts by specialization, by insight gained through experience, and by more flexible procedure.

Id. at 574-75.

Factors traditionally considered by courts in determining whether to invoke primary jurisdiction include: "(1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory authority that (4) requires expertise or uniformity in administration." Syntek, 307 F.3d at 781 (citations omitted).

Pursuant to the doctrine of primary jurisdiction, this Court should dismiss without prejudice or stay the United States' action against Defendants. First, resolving limitations of liability under OPA and administering claims for reimbursement from the OSLTF are complicated issues which have been placed within the NPFC's jurisdiction by Congress. Second, the NPFC has jurisdiction over these issues pursuant to OPA and its own regulations- a statutory and regulatory scheme that subjects the activity of oil spill response to comprehensive regulation. See 33 C.F.R. §§ 2701–2762; see also 33 C.F.R. §§ 136.1–136.313. Finally, as noted above, these issues require the NPFC's expertise and uniformity in administration. See 33 C.F.R. § 136(a)(1). Therefore, even if the Court determines that the United States' action against Defendants is within its jurisdiction, it should still dismiss without prejudice or stay the action since all of the factors supporting this Court's invoking the primary jurisdiction of the NPFC are present.

X. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Court dismiss the United States OPA and non-OPA claims, or stay them until an actual controversy within the Court's jurisdiction arises.

DATED: April 4, 2008

/s/ John Giffin
JOHN D. GIFFIN
JOSEPH A. WALSH
JOHN COX
DAVID A. TONG
Attorneys for Defendants REGAL STONE, LTD. and FLEET MANAGEMENT, LTD.